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747-432—64——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 42

MORTIMER SINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 23–27) is reported at 326 F. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1964 (R. 28). A petition for rehearing was denied on February 10, 1964 (R. 28). The petition for a writ of certiorari was filed on March 9, 1964, and was granted on April 20, 1964 (R. 104; 377 U.S. 903). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the constitutional guarantee of trial by jury gives the defendant in a federal criminal case the absolute right to be tried by the court rather than by a jury.

2. Whether the provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may accept a defendant's waiver of a jury trial only if the government consents, is valid.

3. Whether the court's instructions to the jury or certain statements of the prosecutor denied petitioner a fair trial.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, of the United States Constitution provides:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense.

3. Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of California on 29 of 30 counts charging use of the mails in a scheme to defraud amateur song writers (R. 18–19). He was sentenced to concurrent terms of imprisonment for eighteen months on counts 1 through 11; and was placed on probation for three years on the other counts, commencing at the expiration of his prison sentence and conditioned on the payment of a fine of $250 on each of counts 13 through 30 (R. 20–21).

1. The essence of the scheme to defraud was misrepresenting to amateur song writers that their songs could be marketed commercially if (a) they authorized the Madhatters, a professional vocal group that wished to use the song, to record it, and (b) petitioner had the song published by the Eagle Pass Music Publishing Company, which allegedly was an active and responsible publisher (R. 1–13). The scheme operated as follows: The Ralph E. Hastings Company, which petitioner operated, sent a letter to amateur

song writers stating that the Madhatters wanted to record their songs, and requesting the song writer to advise Hastings (the name under which petitioner operated) if he did not have orchestral and vocal arrangements for the song. Enclosed with the letter was a leaflet listing motion picture credits and other professional appearances of the Madhatters and naming Hastings as their manager. If the song writer indicated that he was interested but did not have the orchestral and vocal arrangements, petitioner informed him that the regular fee for orchestration and vocalization was $87.50. When the songwriter paid, petitioner sent him a form letter stating that the Madhatters had recorded the song, and urging the song writer to send petitioner $94.00 to produce 100 copies of the record so that petitioner could distribute them to selected disc jockeys and have them available for sale to music stores.

Petitioner also represented that he planned to negotiate with an active responsible publishing company to have the song published. A telegram followed advising that a publisher had been obtained and that the publisher would issue a royalty publication contract as soon as he was informed that the records were being manufactured. After the song writer transmitted to petitioner the amount specified for making the records, or a reduced amount suggested if the first proposal was not accepted, the song writer received from the Eagle Pass Music Publishing Company a standard song-writer's contract signed by Dallas Turner (R. 44–51, 37–38, 80–81, 86, 88–92; Tr. 124, 129, 172,

174). Ultimately, the song writer received from petitioner a letter stating that his song-recording contract had terminated automatically after six months and that the Hastings Company had no further interest in it. In some instances, the writer was told to continue further correspondence with the publisher (R. 51–52, 39; Tr. 125).

There was evidence that petitioner did not operate a legitimate song marketing service and did not attempt to exploit the songs for the benefit of the song writers. The Madhatters never heard of the song until they were ready to record it; they were paid to make the recording; and they had no public professional engagements (Tr. 198–202). Evidence concerning the operations and income of the Eagle Pass Music Publishing Company showed it was not an active responsible firm (Tr. 685–686, 572–573), and that petitioner was billed for the printing of its publishing contract (Tr. 707). The records bore the initials M. H. but did not indicate that they were Madhatters' recordings (R. 89).

Petitioner, who testified in his own behalf, asserted that he had acted in good faith in attempting to promote the songs. He stated that the letters he used were forms supplied to him by Sanford Dickenson who had operated the business previously and who, until his death in August, 1958, arranged for production of the records (Tr. 830–840). Petitioner claimed that he had carefully selected the song writers whom he solicited; that he had in fact mailed out records to disc jockeys; and that he had notified music distribu-

tors about the songs (Tr. 840-842). He admitted that the only song publishing agreements that he secured were with the Eagle Pass Company, but claimed that he had discussed songs with other publishers (Tr. 852).

2. Prior to trial, petitioner's counsel twice stated that petitioner wanted to waive a jury (R. 29, Tr. 22–23). He gave no reason, other than stating that "[t]his would be a good case to test" the validity of the provision in Rule 23(a) of the Federal Rules of Criminal Procedure requiring the government's consent to a waiver (Tr. 22–23). The trial judge stated that if both parties agreed to a waiver, he would accept it, but the Assistant United States Attorney refused to waive (R. 30). On the opening day of the trial petitioner, "[f]or the purpose of shortening the trial," offered in writing to "waive [his] right to a trial by jury and to submit the evidence to the decision of this honorable court" (R. 17). Because of the government's refusal to consent, however, the case was heard by a jury which, after a two-week trial, convicted petitioner on all but one of the counts.

SUMMARY OF ARGUMENT

I

The principal issue in this case is whether the Constitutional guarantee of trial by jury gives the defendant the absolute right to be tried by the court rather than by the jury. The Consitution in terms gives no such right. Article III, Section 2, provides that "The

trial of all Crimes, except in Cases of Impeachment, shall be by Jury", and the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *." And, in determining whether the Constitution impliedly confers the right to be tried by a court, the historic federal policy favoring the determination of issues of fact by a jury—particularly in criminal cases—must be given due weight.

A. At English common law, a defendant had no right to compel trial by the court rather than by jury. In America there were some waivers of jury trial prior to and shortly after the Revolution, but there is no indication that the practice was widespread or that defendants in criminal cases were deemed to have the right to choose trial by the court. The framers of the Constitution, therefore, cannot be deemed to have incorporated any settled practice giving the defendant the right to be tried by the court. Indeed, some of the framers believed that the constitutional provision required a jury trial in all criminal cases.

It was not until 1930 that this Court finally ruled that the Constitution permits the defense and the prosecution jointly to waive a jury trial. *Patton* v. *United States*, 281 U.S. 276. The Court there made it explicit, however, that it was not holding that a defendant's waiver "must be put into effect at all events * * *. [T]he maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent

of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant" (p. 312).

The basic fallacy of petitioner's position is his assumption that because a right granted by the Constitution is primarily for the defendant's benefit, the latter, by "waiving" such right may convert it into the opposite right. For example, although a defendant has a constitutional right to a public trial, he cannot, by "waiving" that right, compel a private trial. Similarly, the effect of a waiver of a defendant's constitutional right to trial by jury is that he cannot thereafter complain if he is not so tried; but such waiver does not confer any right to be tried by the court.

B. The provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may accept a defendant's waiver of trial by jury only if the government consents, is valid. Considerations of public policy justify the requirement for consent by court and prosecutor. There are various reasons why trial of a particular criminal case by a jury rather than by a judge would serve the administration of justice. In fraud cases, for example, 12 average members of the community may decide more wisely than a judge whether the misrepresentations were likely to deceive the gullible, or whether the defendant is truthful in claiming that he acted in good faith rather than with the intent to deceive. Thus, inherent in the constitutional procedure for trial by jury (as with so many other constitutional rights) is not only protection of the defendant, but a strong public

interest in preserving the particular practice which the Constitution secures. The drafters of Rule 23 apparently took these policy considerations into account when they decided not to give the defendant the absolute right to decide whether he would be tried by the court.

Rule 23(a) cannot properly be read, as the *amici* would read it, as permitting the prosecutor and the court to withhold consent only to insure that the defendant acted intelligently in seeking to be tried by the court.

In any event, even if there might be circumstances in which a defendant's reasons for wanting to be tried by the court were so compelling that the government's refusal to agree, if unexplained, might be deemed arbitrary, this is not such a case. For here petitioner has shown nothing which even suggests that the jury verdict was based on anything other than an impartial evaluation of the evidence.

II

Neither the trial court's instructions to the jury, nor any statements of the prosecutor, denied petitioner a fair trial. The court properly explained the elements of the offense, fairly described the weight to be given to circumstancial evidence, and correctly stated the law governing testimony of a witness who testifies falsely as to any material matter. The various statements of the prosecutor about which petitioner complains were permissible and, in any event,

any possible prejudicial effect therefrom was cured by the court's cautionary instructions to the jury.

ARGUMENT

I

A DEFENDANT IN A FEDERAL CRIMINAL CASE HAS NO ABSOLUTE RIGHT TO BE TRIED BY THE COURT RATHER THAN BY A JURY

Introduction

Broadly stated, the principal issue in this case is whether the constitutional guarantee of trial by jury gives a defendant in a federal criminal case the right not to be tried by jury, *i.e.*, the right to be tried by the court. Stated more narrowly, the issue is the validity of the provision in Rule 23(a) of the Federal Rules of Criminal Procedure that the court may try a defendant without a jury only if the government consents.

The Constitution, of course, does not in terms give the defendant any right not to be tried by jury. On the contrary, Article III, which defines the judicial power of the United States, states flatly in Section 2: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." For many years the seemingly mandatory language of Article III directing that all criminal cases "shall be" tried by jury

gave rise to considerable doubt whether a jury could be waived even with the consent of both prosecution and defense. See below, pp. 14–20.

Since the Constitution does not give a defendant any explicit right to trial by the court, petitioner is forced to argue that such right is given by implication. The argument has two branches, one purporting to rest on history, the other on logic. *First,* petitioner contends (Br. 12–13) that when the Constitution was adopted, a defendant had a recognized right to choose between trial by jury and trial by the court; and that the constitutional guarantee of trial by jury therefore also must have been intended to protect this right of election. As we shall show, however, this argument rests upon a misreading of the historical material, which does not establish that the common law recognized any right by a defendant to choose between trial by jury and by the court.

Second, petitioner contends (Br. 14–24) that since the constitutional guarantee of trial by jury is for the protection of the defendant, the latter may waive it. This argument is a play on words. Of course, a defendant with advice of counsel and acting intelligently may "waive" his right to trial by jury. *Non constat* that he thereby gains the "right" to be tried by the court. For to say that a defendant may "waive" a constitutional right means only that he cannot complain that he was not accorded that right. The fact that a defendant may waive a constitutional right does not give him another constitutional right to a different procedure than the Constitution guarantees. For example, although a defendant may waive

his constitutional right under the Sixth Amendment to be tried in the State and district where the crime was committed, he cannot by such waiver automatically compel transfer of the case to another district. Similarly, a defendant could not compel a private trial by the simple expedient of waiving his right to a public trial, and thereby shield from public scrutiny conduct which he wishes to keep secret.

The constitutional guarantee of trial by jury, although phrased in the Sixth Amendment (but not in Article III) in terms of the individual defendant's right, is, like so many other constitutional rights, intended also to serve a broader public interest. It furthers effective enforcement of the criminal laws, not only by protecting fundamental personal rights, but also by submitting factual determinations in criminal cases to the collective judgment of 12 average members of the community. Rule 23(a) constitutes a reasonable accommodation of these two facets of the public interest by providing that, although a defendant has the absolute right to insist on a trial by jury, he may be tried by the court only if the representatives of the public interest—the judge and the prosecutor—also consent.

A. THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY DOES NOT INCLUDE THE RIGHT NOT TO BE TRIED BY A JURY

The determination whether a defendant in a federal criminal case has a constitutional right not to be tried by jury must be made in the light of the vital role

which Anglo-American history and traditions always have given to the jury in the trial of issues of fact—particularly in criminal cases. "The federal policy favoring jury trials is of historic and continuing strength." *Simler* v. *Connor,* 372 U.S. 221, 222. A jury trial is "generally regarded as the normal and preferable mode of disposing of issues of fact * * * in criminal cases." *Dimick* v. *Schiedt,* 293 U.S. 474, 485–486; *Patton* v. *United States,* 281 U.S. 276, 312. The underlying philosophy of our judicial system is that a jury, as the representative of the community, has a special competence as a trier of fact. As this Court stated in *Railroad Company* v. *Stout,* 17 Wall. 657, 664:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

A jury has "a special aptitude for reflecting the view of the average person." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 448 (dissenting opinion). See also the statement of Chief Justice Cooley in *People*

v. *Garbutt,* 17 Mich. 9, 27, quoted in *Green* v. *United States,* 356 U.S. 165, 215 (dissenting opinion of Mr. Justice Black). Indeed, the special competence of juries as finders of fact is so well acknowledged that a court may obtain the assistance of advisory juries in civil cases not triable by jury. Rule 39(c), Federal Rules of Civil Procedure.

This favored position which the jury occupies as the trier of facts has its roots deep in the common law. The framers of the constitution intended to preserve and strengthen, and not in any way to curtail, this settled practice of trial by jury.

1. The background and history of the constitutional guarantee of trial by jury indicate that it does not include the right to trial by the court

a. At common law, a defendant had no right to compel trial by the court rather than by jury

In the period of the early development of the jury in England, an accused could choose between trial by jury and trial by battle. After the latter practice was abolished, a defendant who stood mute and refused to plead could not be tried—by a jury or otherwise. In this Pickwickian sense, perhaps, a defendant at that period could be said to have been required to consent to trial by jury. As a practical matter, however, a defendant ordinarily had little choice but to consent to a jury trial, since if he failed to plead he was subject to torture. Moreover, one who advised a prisoner to stand mute was subject to punishment for contempt. (4 Blackstone, *Commentaries* 126 (Tucker ed., 1803).) In 1772 these practices were abolished in England and a plea of guilty was entered for a defendant who stood

mute. 12 Geo. III. c. 20; Thayer, *Preliminary Treatise on Evidence,* 69–82 (1896); 1 Holdsworth, *A History of English Law,* 298–350 (1931); 3 Holdsworth, *Id.,* 607–609 (3d ed., 1923); 2 Pollock & Maitland, *The History of English Law,* 598–652 (2d ed., 1952). Up to that time, however, there is no indication that, except for petty offenses, criminal cases were tried by judges rather than by juries; *a fortiori* a defendant was not permitted to insist on trial by the court.

Prior to and shortly after the American revolution, there is evidence of some waivers of jury trial in Massachusetts, Vermont, Connecticut, Maryland and Pennsylvania. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases,* 20 Va. L. Rev. 655 (1934). There is no indication, however, that this was a widespread practice, or that there was any general recognition of a defendant's right to be tried by the court instead of by a jury. In Massachusetts, for example, waiver developed out of its 1641 Body of Liberties which provided that "it shall be the libertie of the plaintife and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie" (*id.* at 661). Much later after Massachusetts became a state, its supreme court held that a statute was required to permit non-jury trials. *Commonwealth* v. *Rowe,* 257 Mass. 172. In Maryland, the procedure developed from the ancient English practice of submission. At common law, this practice, from which the plea of *nolo contendere* developed, required the assent of the court and eliminated the trial. See *Hudson* v. *United States,* 272 U.S. 451. Until a statute

was enacted in 1809, non-jury trial in Maryland "had been uniformly confined in practice to those cases of petty offence." Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A.J. 699, 701 (1925). There was one case in Pennsylvania, where a fine was imposed, in which the court expressly overruled the prosecutor's objection that the defendant could not be tried without a jury. Griswold, *id.*, p. 666.

But even if the early instances of non-jury trial were more widespread than the available records indicate, they were still not sufficiently important or recognized that the practice can "be treated as embedded in the Sixth Amendment" (*United States* v. *Wood*, 299 U.S. 123, 137). This conclusion is confirmed by the history of the Constitution itself, which (1) shows that the framers intended to preserve trial by jury, and contains no intimation that they also intended to give defendants the right to be tried by the court; and (2) indicates that at least some of the framers apparently believed that the constitutional provision for trial by jury required such trial in all cases, *i.e.*, that it would not permit trial by the court even if both the defendant and the prosecutor consented.

b. The framers of the Constitution did not intend to grant any right to trial by the court

In 1774 the First Continental Congress adopted a resolution supporting trial by jury, which declared that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

1 Journals of the Continental Congress 69. This resolution was directed against the British practice of establishing offenses against the revenue laws which could be tried without juries in the admiralty courts. The Continental Congress also expressed concern against the denial of trial by a jury in the vicinage. *Id.*, at 71–72. The denial of a jury trial was again listed as a grievance in the Declaration of Independence: "For depriving us in many cases, of the benefits of Trial by Jury."

While the proceedings at the Constitutional Convention throw no light on the meaning of the provision in Article II that "trial of all Crimes * * * shall be by Jury,"[1] there are contemporary indications that at least some of the framers believed that it required a jury trial in *all* criminal cases. Thus, in urging adoption of the Constitution, Alexander Hamilton argued that the failure to provide for jury trial in civil cases gave the legislature the authority to adopt or reject that mode of trial, and said: "This discretion, in regard to criminal causes, is abridged by an express injunction of trial by jury in all such cases * * *. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge the power of the Legislature to exercise that mode, if it should be thought proper." *The Federalist*, No. 83 (Dawson

[1] The only reference in the Convention to the clause which became Article III, Section 2, was the addition of an amendment which provides for trials of crimes not committed within any State. 2 Farrand, *Records of the Federal Convention*, 434, 438.

ed., 1863). In the North Carolina convention, James Iredell, in urging that the Constitution be adopted, stated: "The greatest danger from ambition is in criminal cases. But here they have no option. The trial must be by jury, in the state wherein the offence is committed." 4 Elliot's Debates (1854) 145. He also stated: "There is no other safe mode to try these but by a jury. If any man had the means of trying another his own way, or were it left to the control of arbitrary judges, no man would have that security for life and liberty which every freeman ought to have. I presume that in no state on the continent is a man tried on a criminal accusation but by a jury. It was necessary, therefore, that it should be fixed, in the Constitution; that the trial should be by jury in criminal cases, and such difficulties did not occur in this as in the other case." *Id.*, at 171. In the Virginia debates, Edmund Pendleton said that "no other trial can be substituted for that by jury." 3 Elliot's Debates (1854) 521.

Particularly in view of the foregoing opinions that trial by jury was required in all criminal cases, the Constitution cannot be deemed to have converted the "choice" between trial by jury and torture, which the British common law had given defendants, into a choice between trial by jury and trial by the court.[2] If the framers had intended to make the radical

[2] In *United States* v. *Gibert*, 2 Sumner 19, 25 Fed. Cases 1287, 1303–1307 (No. 15,204) (C.C. D. Mass. 1834) Mr. Justice Story, while on circuit, ruled that the British practice of torturing defendants who refused to accept trial by jury had never been adopted in America.

break with the common law that allowing such an election would have entailed, "it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time" (*Patton* v. *United States,* 281 U.S. 276, 297). In fact, the pertinent evidence, scant though it be, indicates that no such election was given.

The First Congress enacted a statute providing that if any person charged with treason or certain other capital offenses stood mute or challenged peremptorily more than a stated number of jurors,[3] the court should proceed to trial as if he had pleaded not guilty. Act of April 30, 1790, Sec. 30, 1 Stat. 119. In *United States* v. *Hare,* 2 Wheeler, Cr. Cas. 283, 26 Fed. Cases 148 (No. 15,304), C.C. D. Md.), decided in 1818, the defendants stood mute, contending that they could not be tried because the crime charged was not covered by the 1790 statute. The court rejected this contention and ordered that the case be tried by a jury. In *United States* v. *Gibert,* 2 Sumner 19, 25 Fed. Cases 1287, 1303–1307 (No. 15,204, C.C. D. Mass. 1834), Mr. Justice Story, while on circuit, held that the defendants had no right to choose trial by the court and that, therefore, it was unnecessary to ask them at arraignment how they wished to be tried. See also *United States* v. *Borger,* 7 Fed. 193 (S.D.N.Y.).

[3] At common law, an accused who attempted to exercise unlimited peremptory challenges was also subjected to torture. 4 Blackstone, *Commentaries,* 353–354 (Tucker ed., 1803).

2. Although a defendant may waive his constitutional right to trial by jury, such waiver does not automatically entitle him to be tried by the court

As noted above, there was considerable doubt for a time after the Constitution was adopted whether the right to trial by jury could ever be waived. It was not until 1930 that this Court finally held that, in certain circumstances, a defendant could waive his right to trial by jury and be tried by the court. *Patton* v. *United States,* 281 U.S. 276.

In the *Patton* case one of the jurors became ill during the trial and had to be excused, and the trial continued before the remaining 11 jurors upon the express consent of the prosecution and defense. This Court treated a trial by a jury of less than 12 as a non-jury trial within the meaning of the constitutional provisions (pp. 288–293). It held (pp. 298–299) that Article III, Section 2, "was meant to confer a right upon the accused which he may forego at his election," and that the trial court "has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury * * *." The Court pointed out that although this provision states that trial of criminal cases "shall be by jury," the same words in the Judiciary Act of 1789 had long since been held to authorize trial by the court with the consent of both parties; and that since the Judiciary Act had always been considered, in relation to the Constitution, "as a contemporaneous exposition of the high-

est authority," the words should be given the same meaning in interpreting the Constitution (pp. 300–301). The Court made it clear, however, that in upholding a defendant's right to waive trial by jury, it was not holding that "the waiver must be put into effect at all events" (p. 312). It explained (*ibid.*, emphasis added):

> * * * Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but *the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had,* in addition to the express and intelligent consent of the defendant.

In *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 277, 278, the Court stated that it had held in *Patton* that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court." The same principle is also stated in the requirement in Rule

23(a) of the Federal Rules of Criminal Procedure that a defendant's waiver of trial by jury is not effective unless there is also "the approval of the court and the consent of the government." This Rule is discussed *infra*, pp. 27–34.

In short, this Court has thrice recognized—in *Patton*, in *Adams*, and in promulgating the Rules of Criminal Procedure—that while a defendant may waive his right to trial by jury, such waiver does not automatically entitle him to be tried by the court, but only if the government and the court also agree. (Indeed, the decision in *Patton* seems to reflect the view that such consent is constitutionally required.) For, as the Court pointed out more recently, in a case involving the Seventh Amendment, "the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 510.

The basic fallacy of petitioner's position is his assumption that because a right granted by the Constitution is primarily for the defendant's benefit, the defendant by "waiving" such right may convert it into the opposite right. The Constitution gives a defendant the right to be tried by a jury, and his "waiver" of that right does not and cannot automatically give him the right to be tried by the court for there is no such constitutional right. Moreover, a defendant's choice of a trial to the court may properly be subjected to such limitations and conditions as the public interest requires. "When there is no constitutional or statutory mandate, and no pub-

lic policy prohibiting, an accused may waive any privilege which he is given the right to enjoy" (*Schick* v. *United States*, 195 U.S. 65, 72). We show below (pp. 27–34), in discussing Rule 23(a), that sound considerations of public policy justify requiring the consent of the court and prosecutor before a defendant may be tried by the court. At this point we shall merely show that there are various constitutional rights, designed primarily for the protection of a defendant, which he may waive but which are not thereby converted into new rights that are the exact opposites of the right given.

Although a defendant has a constitutional right to a public trial, he cannot, by waiving that right, compel a private trial. See *United States* v. *Kobli*, 172 F. 2d 919, 924 (C.A. 3); *Levine* v. *United States*, 362 U.S. 610, 626 (dissenting opinion). Similarly, while a defendant may waive his constitutional right to be tried in the State and district where the crime was committed, he cannot thereby compel transfer of the case to another district. On the contrary, Rule 21 of the Federal Rules of Criminal Procedure permits transfer only for certain reasons, and then leaves it largely to the discretion of the trial judge to decide whether to transfer. See *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245; *Kersten* v. *United States*, 161 F. 2d 337, 339 (C.A. 10), certiorari denied, 331 U.S. 851. Indeed, even where the defendant wishes to waive trial in the district where the indictment is pending and to plead guilty or *nolo contendere* in the district where he has been arrested,

he may do so only if the government consents. Rule 20, Federal Rules of Criminal Procedure.

While a defendant has the right to be present at his trial, he cannot force a trial *in absentia* through waiving that right; rather, he may be compelled over his objection to appear for trial. *Kivette* v. *United States,* 230 F. 2d 749, 755 (C.A. 5), certiorari denied, 355 U.S. 935; *Swingle* v. *United States,* 151 F. 2d 512 (C.A. 10). Finally, while a defendant undoubtedly may waive the right to be confronted with the witnesses against him, it has never been suggested that he can thereby compel the government to proceed by stipulating the facts instead of presenting the witnesses in open court. For inherent in the constitutional procedure, in all the cases specified above, is not only protection of the defendant, but a strong public interest in preserving the particular practice which the Constitution secures. See *supra,* pp. 12–14.

Moreover, a defendant's right to proceed without the constitutional guarantees designed for his protection is subject to regulation by Congress, or by the courts through decision or rule. As noted, Rule 20 of the Federal Rules of Criminal Procedure provides that if a defendant wishes to plead guilty in the district where he was arrested, rather than where the crime is committed, the government must consent. Although a defendant may waive prosecution by indictment, Rule 7 of the Federal Rules of Criminal Procedure bars such waiver in a capital case, and this Court recently held that a defendant in a federal kidnapping case in which it was uncertain whether the death

penalty was applicable, could not waive indictment and consent to be prosecuted under an information. *Smith* v. *United States*, 360 U.S. 1. Even so personal a right as the right to counsel cannot be waived under all circumstances. *Butler* v. *United States*, 317 F. 2d 249, 257–258 (C.A. 8), certiorari denied *sub nom. Benediec* v. *United States*, 375 U.S. 836 (unsuccessful attempt to discharge counsel during trial and continue defense *pro se*). Indeed, in most federal capital cases a jury cannot be waived because only it can impose the death penalty. *E.g.*, 18 U.S.C. 1111 (murder); 1201 (kidnapping); 2113(e) (kidnapping or murder in the course of a bank robbery). In short, a defendant's waiver of rights protected by the Sixth amendment frequently is permitted to become effective only if non-observance of the Constitutional procedures is in the public interest.

To recapitulate on this aspect of the case: The language of the constitutional guarantee of trial by jury, the common law practice out of which it evolved, the views of the framers, and the pertinent judicial decisions, all negate the claim that a defendant in a federal criminal case has a constitutional right to be tried by the court. His constitutional right is to be tried by a jury, and "waiving" that right does not give him any concommitant right not be so tried. The real issue in the case, therefore, is not whether a defendant may waive trial by jury, but whether Rule 23, formulated by this Court and adopted by Congress, may properly require the government's con-

sent as a condition to trial by the court. As we shall show, this limitation in Rule 23 represents a permissible judgment as to the accommodation of the rights of the defendant and the public interest factors involved, and is therefore valid.

B. THE PROVISION IN RULE 23(A) THAT THE COURT MAY ACCEPT A DEFENDANT'S WAIVER OF TRIAL BY JURY ONLY IF THE GOVERNMENT CONSENTS, IS VALID

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

These two limitations on acceptance of a defendant's waiver of trial by jury—approval of the court and consent by the government—are, of course, the limitations which this Court prescribed in *Patton, supra.*

Petitioner's attack on Rule 23(a) (Br. 29–34) is merely another facet of his claim that he has an absolute right to be tried by the court. That is, he argues that such alleged right cannot be limited by the requirement that, before he may be so tried, the government also must consent. If his premise were sound, the conclusion would of course follow. But since, as we have shown, the premise is unsound—*i.e.*, petitioner does not have any constitutional right to be tried by the court—his challenge to Rule 23(a) on that ground must fall.

There still remains the question, however, whether, even though a defendant does not have any constitu-

tional right to trial by the court, it is permissible to require, before he may be so tried, that the court and the government consent. While there is no issue in this case as to the consent of the court, since the latter stated that it would accept the waiver if the government did (R. 30), it is nevertheless appropriate to consider both of these requirements together. For the logic of the argument that since trial by jury is for the benefit of the defendant, he alone should be able to decide whether he is to be so tried, would seem to lead to the conclusion that the consent of neither the government nor the court may be required. Conversely, many of the reasons which justify requiring the consent of one agency are equally applicable to the other.

1. The requirement that a defendant cannot be tried by the court unless the latter and the government also consent rests on sound considerations of public policy and is a reasonable condition for the conduct of criminal trials

There are a number of reasons why trial of a particular criminal case by a jury rather than by a judge would better serve the administration of justice. In fraud cases, for example, 12 average members of the community may decide more wisely than a judge whether the misrepresentations were likely to deceive the gullible, or whether the defendant is truthful in claiming that he acted in good faith rather than with the intent to deceive. In cases where strong community feelings and prejudices are involved, trial by jury may be desirable because the community would be more likely to accept the judgment of 12 of its

members as to the defendant's guilt or innocence than the judgment of an individual judge. A jury verdict in such a case also serves to protect court and prosecution from charges of persecution or "whitewashing," and thus increases public confidence in the administration of justice. In such a situation, moreover, a collective group sometimes may be less likely than a single individual to yield to community pressures, either to acquit or to convict. While such examples could be multiplied,[4] those given are sufficient to show that there are situations where the public interest would be thwarted rather than served if the defendant had the sole right to determine whether he should be tried by judge or by jury.

This is but another way of stating that many constitutional procedures, although designed primarily for the protection of the defendant, also serve a broader public interest. The *Patton* case recognized that "the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions" that, before a defendant may insist on trial by the court, the latter and the prosecutor also must agree (281 U.S. 276, 312).

The drafters of Rule 23 apparently took these policy considerations in account when they made the

[4] In *United States* v. *Holt*, 333 F. 2d 455 (C.A. 2), pending on petition for certiorari, No. 234, this Term, the trial judge had presided at an earlier case involving the same subject matter. He refused to accept the defendant's waiver of a jury trial to avoid the possibility that any facts he had learned in the earlier case might—even subconsciously—influence his judgment in the second case.

determination not to give the defendant the absolute right to decide whether he would be tried by the court. For the arguments which are here made in support of the claim that the government should not be permitted to prevent a defendant from being tried by the court were presented to, but rejected by, the Advisory Committee on the Criminal Rules which formulated Rule 23.

In May, 1942, the Advisory Committee submitted a draft to this Court providing that "Trial shall be by jury unless the defendant in writing with the approval of the court and the consent of the government waives a jury trial." The notes to the First Preliminary Draft cite the *Patton* decision as authority for this provision. The notes (to former Rule 21) also refer to State practice subsequent to *Patton* under which consent of the prosecution was not required for a waiver of trial by jury to be effective, and to the 1931 proposed draft of the American Law Institute Code of Criminal Procedure and the Commentary thereto adopting such State practice.

After the first and second preliminary drafts of the Rules were published, the Advisory Committee received comments proposing that consent of the government and approval of the court should not be a condition of non-jury trials. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 Duke L. J. 29, 69–72. Objections similar to those made by petitioner here were made to the drafts: "With respect to subdivision (a) some thought it undesirable to require the approval of the court and the consent of the Gov-

ernment for a waiver of jury trial. The Constitution ought not to be construed as guaranteeing trial by jury to the Government, for the right to such a trial is exclusively in the defendant. Moreover, the defendant may waive the right to counsel, to a speedy trial, to compulsory process, and to confrontation of witnesses. Since all these safeguards are enumerated in the same section of the Constitution as the right to jury trial, why require consent of the Government as to the latter and not as to the former? The approval of the court should not be required either." *Id.*, p. 69. A Committee of the Chicago Bar Association recommended striking the language "with the approval of the court and the consent of the Government" and substituting "after being informed of his rights by the court voluntarily waives a jury trial." *Id.* p. 72; Stewart, *Comments on Federal Rules of Criminal Procedure,* 8 John Marshall L. Q. 296, 301 (1943).[5] The Advisory Committee, however, did not change its recommendation, this Court promulgated the Rule as proposed, and Congress, by allowing it to become effective (see 18 U.S.C. 3771), adopted it.

Both this history of the adoption of Rule 23(a) and the policy considerations discussed above refute the contention of the *amici curiae* (brief for *Joni Rabinowitz,* pp. 5–6; brief for *Nicholas Jacop Uselding,* pp. 11–13) that the requirement that the government and the court consent was intended solely to insure that in seeking trial by the court the defendant acted

[5] Mr. Stewart was a member of the Chicago Bar Association committee.

voluntarily and exercised an informed and competent judgment. For the objections made to the Advisory Committee's preliminary drafts plainly were based on the assumption that under the proposed rule the court and the government always had the option of compelling a jury trial by withholding consent. If the Rule were intended to limit withholding of consent to situations where the defendant's waiver was involuntary or uninformed, the objectors would have had no occasion to make their broad attack on the Rule. Indeed, it is difficult to see why they would even have objected to such a narrow provision.

Moreover, the opinions in *Patton* and *Adams* themselves make it clear that the purpose of requiring consent was not solely to insure that the defendant had made an intelligent choice in seeking trial by the court. In *Patton,* the Court stated (281 U.S. at 312) that consent of the government and the court must be had "in addition to the express and intelligent consent of the defendant," and that requiring such additional consent was necessary because "the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions." The Court reiterated this view in *Adams,* pointing out (317 U.S. at 277–278) that it had held in *Patton* that a defendant "may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court."

Finally, the Advisory Committee's notes themselves refute the *amici's* contention. The Committee stated: "The provision for a waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld [citing *Patton* and *Adams*]." (Notes of Advisory Committee on Rules, 18 U.S.C. App. p. 3423.) At the time the rules were adopted, the "existing practice" was that unless the government and the court consented, a defendant's waiver of trial by jury was ineffective. As the *amicus* Uselding himself recognizes (Br. 10–11), prior to the effective date of the rules in 1946, three courts of appeals had expressly held that where the government refused to consent to a waiver, the defendant was required to be tried by a jury. *United States* v. *Dubrin*, 93 F. 2d 499, 505 (C.A. 2), certiorari denied, 303 U.S. 646; *Rees* v. *United States*, 95 F. 2d 784, 790–791 (C.A. 4); *C.I.T. Corp.* v. *United States*, 150 F. 2d 85, 91–92 (C.A. 9).

We recognize, of course, that in a particular case a prosecutor's decision whether to consent to trial by the court may be based largely on considerations of litigation strategy—that is, his judgment as to which mode of trial offers the best prospect of success. We submit that the prospect of success is no less proper a factor for the prosecution to consider in determining whether to consent to trial by the court than for the defense to consider in deciding whether to insist on trial by jury. The function of the prosecutor is to prosecute violations of the law, and it is "his duty * * * to use every legitimate means to bring about a just [conviction]" (*Berger* v. *United States*, 295 U.S.

78, 88). "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses." (*Patton* v. *United States*, 281 U.S. at 312; see *supra*, pp. 12–14, 20–21.) Particular judges may have the reputation of having fixed attitudes toward certain types of cases and individuals, and it is wholly proper for the prosecutor to conclude that in such a case the administration of justice will be better served by having the defendant's guilt or innocence determined by the jury rather than by the judge. For the public interest requires not only protection of the rights of the defendant, but also fairness to the prosecution in order to insure that the guilty do not improperly escape just punishment for their crimes.

Congress has recognized that the government has an interest in the composition of the jury, and has legislated in this respect. In 1855, this Court held that the recognition in the Act of 1790 of the right of peremptory challenge by a defendant in treason and capital cases did not also cover the qualified right, existing at common law, of the government to challenge. *United States* v. *Shackleford*, 18 How. 588. Shortly thereafter Congress passed the Act of 1872, 17 Stat. 282, regulating the number of challenges, and giving the government the right of peremptory challenge (5 for capital cases, 3 for others). And, interestingly, the number of peremptory challenges allowed the government has been increased over the years (raised to 6 for the government in all cases in the 1911 judicial code, 36 Stat. 1166, and to an equal

number with defendant (20) in capital cases by Rule 24(b)).

2. The petitioner has shown no particular circumstances which might dictate against trial by jury in this case

Even if, contrary to our argument, there might be circumstances in which a defendant's reasons for wanting to be tried by the court were so compelling that the government's refusal to agree, unless explained, might be deemed arbitrary, this plainly is not such a case. The only reason which petitioner gave for not wanting a jury was to shorten the trial (R. 17). That argument, of course, could be made in virtually every case. For trial before the court avoids many time-consuming events that occur if a jury is used, such as *voir dire* examination of jurors, summations by counsel, detailed instructions by the court, removal of the jury from the courtroom while counsel argue non-evidentiary questions before the judge, etc.

Petitioner argues (Br. 24), however, that there are "occasions when a jury might be influenced by passion, prejudice, or public feeling, or lack sufficient knowledge, experience, or insight to give the defendant a fair trial. Often, the subject matter may be too technical or too involved for the jury." But, once again, this is not such a case. On the contrary, as we have shown (*supra*, p. 27), the issues in this mail fraud case were particularly appropriate for determination by a jury. For twelve representative members of the community usually are better able than a single legally-trained individual to determine whether a defendant had the intent to defraud or

acted in good faith. Nothing in this record even suggests that the jury may have been motivated by improper considerations or that it was unable properly to evaluate the evidence. The petitioner can hardly claim that he was treated unfairly because in his case there was followed the usual practice of letting a jury determine his guilt or innocence. "It cannot be conceived how a trial by a jury, presided over by a judge, could possibly be prejudicial to an accused" (*Rees* v. *United States*, 95 F. 2d 784, 790 (C.A. 4)).

II

NEITHER THE INSTRUCTIONS OF THE COURT, NOR ANY STATEMENTS OF THE PROSECUTOR DENIED PETITIONER A FAIR TRIAL

In addition to his claim that he had a constitutional right to be tried by the court, petitioner also contends (1) that the district court's instructions to the jury were inadequate and erroneous, and (2) that certain statements of the prosecutor denied him a fair trial. Neither contention has substance.

A. THE COURT'S INSTRUCTIONS WERE PROPER

The court properly explained the elements of the offense of mail fraud to the jury. After telling the jury that it must find a scheme devised with intent to defraud, the court explained that "[t]o act with 'intent to defraud' means to act knowingly and with the specific intent to deceive, for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself" (R. 69). It

advised the jury (R. 72) that only conscious fraud is punishable, cautioning that "although men may be visionary in their plans and believe they will succeed, yet in spite of the ultimate failure of the concern, they may be wholly innocent of committing a conscious fraud." It instructed that petitioner should be acquitted if he acted in good faith "no matter how visionary might seem the plan or judgment of the defendant" (R. 71–72). The court also explained that the "effect of the representations that were made is to be determined by the impression they would likely produce upon a mind of ordinary prudence and comprehension. If the representations are designed to mislead they are proscribed by the statute" (R. 74). Contrary to petitioner's contention (Pet. 35), the government was not required to show that the victims of the fraud relied upon the representations to their detriment. "It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor" (*Durland* v. *United States*, 161 U.S. 306, 315).

2. The court told the jury that the only way intent could be proved was by circumstantial evidence (R. 67). It charged that all the circumstances necessary to show guilt must be consistent with each other and with defendant's guilt and must be inconsistent with any reasonable theory except that of guilt (R. 67). It then charged the jury that if all the circumstantial evidence measured up to the foregoing requirements,

it should return a guilty verdict (R. 67). Read in context, the instruction would not have misled the jury, as petitioner contends (Br. 35–36), into basing its determination solely upon circumstantial evidence. On the contrary, the court specifically instructed the jury that its decision whether the defendant was guilty or innocent was to reflect "all the evidence * * *" (R. 65).

3. The court did not instruct, as petitioner contends (Br. 36), that the jury must reject all the testimony of a witness if he testified falsely as to any matter. The court charged (R. 66) that a "witness false in one part of his or her testimony is to be distrusted in others"; and that the jury may reject all of the testimony of a witness who has wilfully sworn falsely to a material point and must treat such testimony with distrust and suspicion "and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has, in other particulars sworn to the truth."[6] This was a correct statement of the law governing the weight to be given to testimony of a witness who testified falsely as to any material matter. See *Shelton* v. *United States*, 169 F. 2d 665, 667 (C.A.D.C.), certiorari denied, 335 U.S. 834; *United States* v. *Rutkin*, 189 F. 2d 431, 438 (C.A. 3), affirmed on other grounds, 343 U.S. 130.

4. As noted above, the court instructed the jury that petitioner should be acquitted if he acted in good faith, and explained the meaning of that term (R. 71–

[6] In deciding to give such an instruction the trial court did not, contrary to petitioner's contention (Br. 36), abuse its discretion.

72). The claim of good faith was petitioner's defense. If petitioner desired instructions concerning any other theory of defense he should have requested them. *Apel* v. *United States*, 247 F. 2d 277, 282–283 (C.A. 8).[7]

B. THE PROSECUTOR'S STATEMENTS WERE PROPER, AND IN ANY EVENT DID NOT PREJUDICE PETITIONER

1. Petitioner contends (Br. 38–39) that in his opening statement government counsel should not have referred to the anticipated testimony of a Mr. Berg. The prosecutor stated (R. 40) that "Mr. Berg was engaged in dealing with amateur songwriters with Mr. Singer for the period of mid '55 through 1957. The business transaction engaged in by Mr. Berg and Mr. Singer are not part of the indictment. The question before the jury is fraudulent intent," Subsequently the court ruled, however, that Berg's testimony was inadmissible on the issue of fraudulent intent because it was too remote in point of time (R. 59–60). Both during the trial and in his instructions, the judge told the jury that it was to decide the case on the basis of the evidence, and not "on the basis of the opening statement of either side or of arguments of counsel" (R. 63, 66). The reference in the opening statement to Mr. Berg was a permissible

[7] The objection to the instructions on presumption of innocence and reasonable doubt (Pet. Br. 37), not raised in the petition for a writ of certiorari, are likewise without merit. The court charged (R. 70) that the defendant is "at all times clothed" with the presumption of innocence. The instructions as to reasonable doubt met the standard of *Holland* v. *United States*, 348 U.S. 121, 140.

statement of what the prosecutor hoped to prove; it was not prejudical to petitioner; and any possibly adverse effect was cured by the court's instruction that the jury was not to rely on it.

In his opening statement, the prosecutor also indicated (R. 35–36) that the reason the Madhatters song group was willing to record the songs was not because they wished to exploit them commercially, as had been represented, but because they had an arrangement with the Ralph E. Hastings Company to sing any song for two dollars. When he asked, "Would you have bought, if you were the amateur songwriter, if you had known all of that information," the court sustained an objection that the statement was argumentative, and instructed the prosecutor to "[j]ust state what you are going to prove" (R. 36). This minor incident plainly was not prejudicial to petitioner.

2. The amateur songwriters were told by petitioner that an active, responsible publishing company was interested in commercially exploiting their songs. Sixteen songwriters received contracts from the Eagle Pass Music Publishing Company, which was operated by Dallas Eugene Turner. As part of the government's case, Turner, Emil Henke and Rexford Hufstedler testified about the Eagle Pass company. Turner proved to be an adverse witness (R. 55). During Turner's testimony petitioner objected to some of the government's questions on the ground that the government had not connected petitioner with Eagle Pass (Tr. 265). When the prosecutor said

that he wanted "to show that [petitioner] was interested in this company," Turner testified that petitioner was never interested in Eagle Pass. The court then instructed the jury that no witness had testified to any such interest (R. 52–53). Later Turner again testified that Singer had no financial interest in the company (Tr. 273, 276), although he stated that during the time he operated Eagle Pass, petitioner had loaned him money (Tr. 272–273). There was no impropriety in the prosecutor's explanation that the reason for his questions was to prove that petitioner was interested in the Eagle Pass company; and any possibility that the jury might believe he had proved it was eliminated when the court emphasized to the jury that he had not established that fact.

Turner testified that one Henke had an interest in the Eagle Pass company and that Turner ultimately sold the company to Henke and Hufstedler (R. 53–54). Henke testified that he had been associated with Eagle Pass (Tr. 562). When the government asked Henke whether he had invested any money in Eagle Pass, the court sustained petitioner's objection, ruling that "[i]t is immaterial unless you intend to trace it to the Singers" (R. 61). The prosecutor said that he expected a negative answer, and the court then instructed the jury to disregard this statement and admonished the prosecutor to learn the rules of evidence (R. 61). Later, on cross-examination Henke stated that Turner gave him an interest in the company (Tr. 574) and that he had purchased Turner's interest in November 1958 (Tr. 577). The prosecution was not allowed to inquire into the price (Tr. 583).

Petitioner was not prejudiced by these statements. Indeed, the court's rulings were more favorable to petitioner than necessary. In proving the charge that the song writers were led to belive that a responsible publishing firm was ready to print these songs, it would have been permissible for the prosecution to show that the firm involved was so insubstantial that it was sold for an insignificant price or was given away. Certainly the prosecutor was justified in explaining what he was trying to develop. In any event, the court's instruction to the jury to disregard the statement eliminated any possible prejudice. As to the other portions of the record to which petitioner refers (R. 54, 57–58, 63–64), none of the questions asked reveals any basis for imputing improper conduct to the prosecutor.

3. Dallas Turner testified that he saw Hufstedler sign a document pertaining to the Eagle Pass company indicating that Henke and Hufstedler had become his partners (R. 54–55). Henke stated he never knew Hufstedler (Tr. 572). Hufstedler testified that he had never been a partner of Turner (R. 62). When shown the document, Hufstedler stated that he had not signed it but that "[t]his could be my signature or a copy of my signature" (R. 62). Hufstedler also stated that he allowed Turner to use some of his office space (Tr. 685).

Petitioner claims (Br. 42) that he was prejudiced by the prosecutor's description in his closing argument of Hufstedler's signature on the document as a "forgery" (R. 98). We believe that this remark was a reasonable inference from Hufstedler's testimony.

In any event, the court immediately instructed the jury to disregard the statement, and then permitted the prosecutor to read to the jury the transcript of Hufstedler's testimony on that point (R. 98). At the conclusion of the prosecutor's argument, the defense was permitted to read to the jury the cross-examination of Hufstedler bearing on this question (R. 103–104). Since (1) the evidence justified the inference that Hufstedler's signature was false, (2) the testimony relating to that issue was read to the jury, and (3) the court instructed the jury to disregard the prosecutor's statement, petitioner could not have suffered any prejudice from the prosecutor's colloquial description of the signature as a "forgery."

The lack of merit to the other objections to the closing argument is evident from the face of the challenged remarks and is underscored by the failure of experienced trial counsel to except to them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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